

# Section 204 – Protection from Polygraph Testing

Section 204 of the Congressional Accountability Act (CAA) applies certain rights and protections of the Employee Polygraph Protection Act of 1988 (EPPA) to covered employees. These rights and protections generally provide that no employing office, irrespective of whether a covered employee works in that office, may require or request that any covered employee or prospective employee take a lie detector test, or use the results of any lie detector test of any employee or prospective employee.

The CAA requires the Board of Directors of the Office of Compliance issue regulations that must ordinarily be the same as the substantive regulations promulgated by the Secretary of Labor under the EPPA. These regulations can be found in the substantive regulations of the Office of Compliance (“Office of Compliance Regulations”). The CAA specifically provides that nothing in Section 204 of the Act shall prevent the Capitol Police from using lie detector tests in accordance with regulations issued by the Board of Directors of the Office of Compliance.

## 1. Coverage

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The term “lie detector” includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of giving a diagnostic opinion regarding the honesty or dishonesty of an individual.

The term “lie detector” does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Nor does the term “lie detector” include written or oral tests commonly called “honesty” or “paper and pencil” tests, machine scored or otherwise, or graphology tests commonly called handwriting tests.

The covered employees and employing offices subject generally to the CAA are described in the “Covered Employees” section of the *CAA Handbook* and the Office of Compliance web site ([www.compliance.gov](http://www.compliance.gov)).

## 2. Prohibition on the Use of Lie Detector Tests

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Except as allowed by specific exemptions (described below), employing offices are prohibited from:

- ◆ Requiring, requesting, suggesting or causing, directly or indirectly, any covered employee or prospective employee to take or submit to a lie detector test
- ◆ Using, accepting, or inquiring about the results of a lie detector test of any covered employee or prospective employee
- ◆ Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any covered employee or prospective employee to take such action for refusal or failure to take or submit to a lie detector test, or on the basis of the results of such a test

These prohibitions apply regardless of whether the covered employee works in the employing office that engages in the use of lie detector tests.

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## 3. Exemptions

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The statute and Office of Compliance Regulations create several exemptions to the general prohibition on polygraph tests, including:

- ◆ National defense and security, under which the Federal Government, not the employing office, may administer any lie detector test in certain situations. These situations include the performance of any intelligence or counterintelligence function in connection with certain activities of the Department of Defense and the Department of Energy; the performance of any intelligence or counterintelligence function in connection with certain activities of the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency; and the performance of any intelligence or counterintelligence function, to any covered employee whose duties involve access to top secret information.
- ◆ Conducting an ongoing investigation into a specific incident that resulted in economic loss or injury to the employing office's operations. An employing office may request an employee, under certain conditions, to submit to a polygraph test, but no other type of lie detector test, only if: a) the covered employee had access to the property in question; b) the employing office has reasonable suspicion that the employee in question was involved; c) the employing office sets forth in writing the specifics about the incident and the basis for testing the employee.
- ◆ Employing offices authorized to manufacture, distribute, or dispense a controlled substance. This exemption allows an employing office to administer a polygraph test, under certain conditions, to: a) prospective employees who would have "direct access" to the manufacture, storage, distribution, or sale of any such controlled substance; or b) a current employee if the test is administered in connection with an ongoing investigation of conduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employing office and the employee had "access" to the person or property that is the subject of the investigation.
- ◆ None of the limitations on the use of lie detector tests by employing offices apply to the Capitol Police. However, this exclusion applies only with respect to lie detector tests administered by the Capitol Police to its own employees; it does not extend to contractors or nongovernmental agents of the Capitol Police, nor does it extend to the Capitol Police with respect to employees of a private employer or an otherwise covered employing office with which the Capitol Police has a contractual or other business relationship. Moreover, the Capitol Police may not require a covered employee not employed by the Capitol Police to take a lie detector test, except where it administers such lie detector tests as part of an ongoing investigation by the Capitol Police.

Where polygraph tests are allowed (other than in the intelligence context or by the Capitol Police), the CAA subjects such tests to strict standards concerning conduct and length of the test and use of results, and examinees have a number of rights, including the right to notice before testing and the right to refuse or discontinue a test.

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## 4. Waivers Prohibited

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The CAA makes applicable a provision of the EPPA prohibiting certain waivers. Under this provision, the rights and procedures of the EPPA, as made applicable by the CAA, may not be waived by contract or otherwise, unless the waiver is part of a written settlement agreed to and signed by the parties to a pending action or complaint.

## 5. Intimidation or Reprisal

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Intimidation, reprisal, or discrimination against a covered employee for opposing practices or for initiating or participating in a proceeding is prohibited.

## 6. Remedies

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In case of a violation, the law provides for legal and equitable relief as may be appropriate including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.